No. 2030

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MONTANA TONOPAH MINING COMPANY (a corporation),
Plaintiff in Error,

vs.

R. P. DUNLAP,
Defendant in Error.

Upon Writ of Error to the Circuit Court of the United States, for the District of Nevada.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

Filed this ..... *day of June, 1912.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the plaintiff in error and respectfully petitions this honorable court to grant it a rehearing upon the errors assigned upon the record herein and to withdraw and annul the opinion heretofore, and on the 6th day of May, A. D. 1912, filed herein,

affirming the judgment of the court below, and as grounds and reasons for said petition the plaintiff in error saith:

First. This honorable court erred in its statement, and therefore in its understanding, where in said opinion it is said:

> "There was some testimony to support plaintiff's claim that he had rendered services for the company beyond the scope of the duties of the offices which he held."

Second. This honorable court erred in its statement in said opinion wherein it is said:

> "The portions of the resolution of February 15th, 1910, so admitted in evidence were in line with the resolution of the same board adopted February 2nd, 1905, to the introduction of which no objection was made."

for the reason that the resolution of February 2nd, 1905, especially recites that the Directors of the corporation

> "* * * *are especially pleased and gratified that Mr. Dunlap remains on the Board of Directors, where we may continue to enjoy the benefits of his wise counsel,* which has been a material factor always and has contributed in such a marked manner to the success of the company."

Third. That this honorable court, while in its opinion going in detail into the evidence adduced at the trial, has ignored the fact, as plaintiff in error contends, that there was no evidence whatever

that the services rendered by defendant in error were outside the scope of his official duties.

Fourth. That the burden of proof was at all times upon the defendant in error to show that the services, compensation for which he sues to recover, were entirely outside the scope of his official duties, and defendant in error has failed to submit evidence to that effect.

Fifth. That the evidence adduced at the trial showed there were no by-laws of the corporation during the greater part of the period defendant in error was an officer and during which he alleges to have rendered services, suit for the value of which is brought, and that there was no contract, resolution of the corporation, or other evidence submitted, excepting the custom and usage of officers and directors occupying identical positions with defendant in error in similar corporations at the same time and place, by which the jury could determine whether or not the services alleged to have been rendered were within, or without, the scope of defendant in error's official duties.

Sixth. That this honorable court erred in its opinion that the admission of any portion of the resolution of the Board of Directors of defendant company adopted February 15, 1910, was competent for any purpose.

Seventh. The opinion of this honorable court, affirming the judgment of the court below, is in

other respects erroneous to the great injury and detriment of plaintiff in error.

Plaintiff in error, therefore, prays this honorable court to grant a rehearing of the issues presented by the errors in this cause.

Dated, San Francisco,
June 5, 1912.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

Argument.

The court has patiently reviewed in great detail nearly all of the evidence of plaintiff as to what services he rendered for and on behalf of the defendant corporation and the circumstances under which the plaintiff claims to have rendered such services, but in so doing it appears to the defendant that the crucial facts which entitle the plaintiff to a recovery for such an extraordinary amount and under such unusual circumstances may have been overlooked and the importance of the principle herein involved which may permit unscrupulous directors to prey unrestrainedly upon the assets of their corporations warrants us to again direct the attention of the court to the law and facts herein presented.

The court in its opinion states that what plaintiff claims and gave testimony tending to support was that the services, for the value of which he sues, bore certain characteristics as follows:

(a) Such services were beyond the scope of his duties as Secretary and Treasurer, Director, or Vice-President.

(b) Such services were neither volunteered nor gratuitous, but were rendered at the express request of the President and Manager of the company, and

(c) That both plaintiff and the company expected that they were to be paid for.

From January 24, 1903, to September, 1903, plaintiff was merely Secretary and Treasurer of the defendant corporation; from September, 1903, to February 15, 1910, he was a Director of the company and continued at the same time his office of Secretary and Treasurer to February 2, 1905; from September 11, 1906, to February 15, 1910, he was a Vice-President of the company, as well as a Director, and upon the last mentioned date by resignation he relinquished both of his offices as a Director and Vice-President; so that from September, 1903, eight months after his connection with the company began, until eleven days prior to the beginning of this action, he was at all times a Director of the company.

It must be admitted that certain duties fell upon him by virtue of his office of Secretary and Treasurer, and it must also be assumed that the offices of Director and Vice-President of the corporation carried with them certain other obligations and duties, and to entitle the plaintiff to recover at the hands of the jury two facts of equal importance must have been made to appear clearly to the jury regarding the services, compensation for which he seeks to recover, to wit:

(a) They must be such as are clearly outside of his duties as an officer and director, and

(b) They must have been intended not to be gratuitous.

While it may be admitted the plaintiff's testimony tended to show that he did not intend the services to be gratuitous, a careful review and search of all of the evidence in the case fails to show a scintilla of evidence to the effect that the services were outside the duties of the respective offices which plaintiff from time to time held. We assume that it is not important in this action whether or not the services were requested by the President and General Manager of the company, inasmuch as if such requested services were within the scope of plaintiff's duties he could not on that account recover, and if they were shown to be without his duties he could recover whether or not requested.

Defendant most urgently maintains, however, that there must have been furnished to the jury some standard or measure by which they could determine the character of the services rendered and the relation of such services to the official duties of plaintiff. There should have been shown some standard or measure by which they could determine whether or not the services rendered by the plaintiff coincided with the duties of his offices. The burden of proof under the pleadings lay upon the plaintiff to provide such standard or measure, and this he most glaringly failed to do. Permitting the case to go to the jury without proof of this character created error as fatal as to permit the jury to pass upon any other fact in issue, concerning which no evidence has been submitted, and the far-

reaching consequences of allowing a jury to determine without evidence what are the duties of any officer of a corporation cannot be over-estimated. If the plaintiff's services were clearly without the scope of his official duties, such fact should have been made to appear. The services related by the plaintiff may have been meritorious and useful to the corporation, but so far as the evidence submitted by the plaintiff is concerned, no one can ascertain whether such services should be considered official, or extra-official. To determine this fact resort might have been had to the statutes of the state where the corporation was domiciled, to its charter, to any minutes showing a resolution of employment, or a contract of the corporation, and, these failing, the custom prevailing in similar corporations in the same community and at the same time should have been shown to enable the jury to find any fact as to the character of the services.

The line should have been clear cut and decisive, for this matter lies at the fonudation of plaintiff's right to recover. Was there evidence of any kind submitted by the plaintiff tending to show whether the services, which are the subject of this action, were official or non-official? May we leave a jury without evidence, to assume as to facts of any character? Could the jury in any way determine, directly or inferentially, what services of plaintiff were official or non-official without proof of some character upon this point? So far as we have been able to ascertain none of the cases cited in the

opinion of the court have turned upon this question of burden of proof. In the Fitzgerald case, 137 U. S. 96, the plaintiff's salary as General Manager had been fixed on a certain date and his services had been of the same nature before and after that date. In the Toponce case, 152 U. S. 405, the testimony was that the plaintiff had been "the General Manager of the company's business". In Railroad Company v. Tiernan, (Kan. Sup.) 15 Pac. 544, the question decided was the same as that of Rasborough v. Canal Company, 22 Cal. 557, and other cases, that the Board of Directors had a right to fix the salary of the President of a corporation after the services were rendered, it having been understood that the President was to be compensated, but in none of the cases which we have examined has it been disclosed that the plaintiff is relieved from the obligation of showing whether his services were within or without his official duties, and the only manner in which that could be done was to place in the possession of the jury accurate knowledge as to what his official duties were. In such a case the jury would be able to determine the character of the services. We find no precedent for the belief that a jury, or a court, may decide such an important *fact* without proof, or that a jury, or a court, may take judicial notice of what are the official duties of any officer or director of any particular corporation. Such duties vary greatly in different corporations and they may be entirely those assigned to the plaintiff by a resolution of the board.

There is no proof, nor attempted proof, in the case under consideration whether the isolated services claimed to have been rendered by the plaintiff were such as he would naturally be expected to render, or be required to render, during his occupancy of the various offices which he from time to time filled. They are merely certain isolated services and were allowed to go to the jury who were permitted to infer without evidence as to whether or not the plaintiff should have performed them as his official duties. In the case of Brown v. Republican Mountain Silver Mines (Colo.), 30 Pac. 66, the court states:

> "But even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to a corporation upon an implied contract, unless it be established by a clear preponderance of the evidence—First, *that the services were clearly outside his ordinary duties as a director,* and, Second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers, as well as himself, that the services were to be paid for."

In the case of Dial v. Inland Logging Company (Wash.), 100 Pac. 157, the court held:

> "A trustee or officer cannot recover, unless it be established by a clear preponderance of the evidence *that the services were clearly outside of his ordinary duties.*"

And, also, in Henry v. Michigan Sanitarium and Benevolent Association (Mich.), 100 N. W. 523:

> "A trustee of a corporation who claims compensation for services *must prove not only that the services fell outside of the scope of his regular duties,* but also that they were performed under circumstances sufficient to show that payment was understood."

In the Territorial Court of Utah, before its removal to the federal court, where the question was not raised, it was held in Toponce v. The Corinne Mill, Canal and Stock Company, 24 Pac. 534:

> "It must be shown by a preponderance of the evidence *that his services were clearly outside his duties as an officer.*"

While it is true in this case that no evidence was submitted by the plaintiff in regard to the fact as to whether his services were official, or extra-official, and there was no evidence upon which the jury should have been instructed, or could have found that the services were extra-official, yet there is full and complete evidence in the testimony of Mr. Lynch and Mr. Knox that the services testified to by the plaintiff were identical with those rendered by like officers of other corporations operating at the same time and in the same community. On page 227 of the transcript, Mr. Lynch, giving his reasons for believing that the services testified to by the plaintiff were entirely within the scope of his official duties, states:

"In all my time in Tonopah I have been connected with corporations, several, and I have performed just these same duties, patenting claims, settling accidents, discharging all that line of duties, and I never received a cent for that, nor never expected to for years. That is the reason, in my judgment, I do not think they are of value. * * *

"Q. Now, I understand you testify, Mr. Lynch, that, basing your knowledge of the course and management of mining corporations at Tonopah and in that vicinity, that in your opinion services for which Mr. Dunlap is seeking to recover in this action were without value?

"A. Yes, outside of his scope, outside of the duties that were required of him."

On pages 302 and 303 of the transcript Mr. Knox testified that he knew what duties were usually and customarily performed by Secretaries and Treasurers of corporations operating in the Tonopah Mining District in the State of Nevada during the period within which the plaintiff was the Secretary and Treasurer of this corporation, and on page 303 in effect that the services so rendered were identical with those claimed to have been rendered by the plaintiff and the introduction of this testimony by Mr. Knox of custom was most strenuously resisted. All of the testimony, both of Mr. Knox and Mr. Lynch, as to custom stands uncontradicted in any manner, and in the absence of any other proof, either by plaintiff or defendant, as to whether or not the services claimed to have been rendered by the plaintiff were such as may be denominated offi-

cial, or non-official, the testimony of these two gentlemen must control.

Eager v. Atlas Insurance Company, 14 Pickering 141;

Adams v. Pittsburg Insurance Company, 76 Pa. St. 411.

The question, therefore, to be determined with reference to the above is whether or not as a matter of law a jury may determine what services rendered by an officer or a director of a corporation are within the scope of his official duties when there is no evidence as to what his official duties are, and whether or not without evidence a court, or a jury, may take judicial notice of what constitutes the scope of the duties of directors and officers of corporations.

The court in its opinion has referred to two certain resolutions, the whole of the first and a portion of the second of which were admitted in evidence at the trial. The first resolution was adopted at a meeting of the Board of Directors of the defendant company on February 2, 1905, upon the occasion of plaintiff tendering his resignation as Secretary and Treasurer of defendant company. It will be borne in mind that at the time this resignation was tendered and until the 15th day of February, 1910, plaintiff was a Director of the defendant. The other resolution, a portion of which only was admitted in evidence, was adopted at a meeting of the Board of Directors practically five years subsequent

to the first and upon the occasion of plaintiff making his demand upon the corporation for compensation. It is the contention of the defendant that the court has not correctly read the two resolutions, otherwise it could not have arrived at the conclusion expressed in the opinion that the latter resolution was in line with the former. The former resolution recites that plaintiff's resignation is accepted with sincere regret and generally commending plaintiff for the zealous interest he has taken in the company's affairs, complimenting him upon the able and efficient performance of his duties and congratulating the corporation upon the fact that the plaintiff remains on the Board of Directors

> "where we may continue to enjoy the benefits of his wise counsel, which has been such a material factor always and has contributed in such a marked manner to the success of the company".

This resolution, while considered immaterial to the issues, was admitted without objection by the defendant. It cannot be conceived that the adoption of this resolution at the acceptance of plaintiff's resignation could possibly be construed as the acknowledgment of an obligation on the part of the company to pay any further compensation for the services which plaintiff had then rendered. The resolution does not state that the board is pleased and gratified that the plaintiff remains with them where they may continue to enjoy the benefits of his counsel at a fixed salary, or compensation, and

it was only natural that if compensation at that time had been contemplated some reference would have been made to it in the resolution.

The admission in evidence of the resolution adopted at the meeting of the board held on February 15, 1910, however, was made over defendant's objection.

We do not see in what respect the resolutions are similar, the latter resolution having been adopted as a compromise for the purpose of settling a large claim for the amount of One Thousand Dollars by a board different in its personnel from that serving at the time the services were rendered and upon a date more than seven years subsequent to the time when the claim began to run, and could not be construed in any manner as binding the corporation beyond the amount set forth in the offer contained in the resolution if such offer had been accepted at that time.

The plaintiff must recover by the strength of his own case. If he had rendered no services he surely could not recover by virtue of the resolution of February 15, 1910, unless he had accepted the proposition therein contained and proved its acceptance. Further than this, it was not competent as an admission by the corporation, either that the services were outside the scope of plaintiff's official duties, or that he was entitled to compensation therefor, for the reason that it was too remote in point of time and made only by individual directors who had

no power to bind the corporation itself to perform an ultra vires or an unlawful act. The situation would have been entirely different if there had been recognition made while the services were being rendered that such services were outside the scope of plaintiff's official duties, but as a matter of fact the recognition was not so made and was made only for the purpose of a compromise, as appears upon its face.

We respectfully submit that few petitions for rehearing of cases in this honorable court have as their ground a principle so important or a stronger basis both in law and of fact than this one.

All of which is respectfully submitted.

Dated, San Francisco,
June 5, 1912.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

RUFUS C. THAYER,
Counsel and Attorney for Plaintiff in Error and Petitioner.